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ALEXANDER L. STEVAS,
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NO. 82-5170

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

MITCHELL THOMAS BLAZAK,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was petitioner prejudiced in his ability to present mitigation evidence when his resentencing hearing took place over 5 years after his conviction and original sentencing?

2. Is it cruel and unusual punishment to impose the sentence of death on one who shot and killed the two robbery victims?

3. Was petitioner given adequate notice that the death sentence was a possible punishment where one of the statutes in the indictment provided that the sentences for first degree murder were life and death?

4. Is Arizona's death penalty open to "freakish" imposition because anything can be presented in mitigation?

5. Is a jury required to impose the death sentence?

6. Is there a constitutional violation in requiring a defendant to prove mitigation?

7. Does Arizona deny equal protection because no women are currently under a sentence of death, although it is available to persons of either sex?

8. Is there any evidence that the state suppressed evidence material to mitigation?

9. Under Arizona's procedures, if the Arizona Supreme Court sets aside one aggravating circumstance, must the case be remanded to the trial court for a new sentencing hearing?

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STATEMENT OF THE CASE

Petitioner and an accomplice entered the Brown Fox Tavern in Tucson, Arizona, in the early morning hours of December 15, 1973. They were armed, and petitioner wore a ski mask. Petitioner demanded money from the bartender, and shot and killed him and a bystander, when the bartender did not turn over the money. Another bystander was injured. Petitioner was convicted of two counts of first degree murder, assault with intent to commit murder, and attempted armed robbery. The Arizona Supreme Court affirmed the convictions and sentences. 114 Ariz. 199, 560 P.2d 54 (1977).

On December 6, 1979, the Arizona Supreme Court remanded the case for resentencing pursuant to State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979). The trial court set the resentencing hearing for January 8, 1980. Petitioner moved to continue the hearing, and, on January 14, 1980, moved for court appointment of an investigator. The trial court authorized petitioner's attorney to hire an investigator at the Pima County schedule rate of $5.00 per hour, with a limit of $500.00. (R.T. of Jan. 14, 1980, a 6-7.) On February 5, 1980 and March 3, 1980, petitioner moved for additional continuances of the resentencing. Defense counsel stated he anticipated no further continuances as the law clerk-investigator had been making progress on the case. (R.T. of Mar. 3, 1980, at 3.)

The state made its aggravation presentation to the trial court on April 1, 1980. Pursuant to Ariz.Rev.Stat.Ann. § 13-454(B), the prosecutor asked the trial court to consider

the evidence presented at trial. (R.T. of Apr. 1, 1980, at 53.) Specifically, he directed the trial court's attention to evidence demonstrating the cruel, heinous, or depraved nature of the killings [Ariz.Rev.Stat.Ann. § 13-454(E)(6)] set out in R.T. of November 14, 1974, at 102, 117, 135, and 143, and November 15, 1974, at 3. (Id. at 56.) The prosecutor also asked the trial court to take judicial notice of petitioner's convictions of robbery and assault with intent to commit murder in Pima County Superior Court Cause No. A-15829. (Id. at 57.) He argued that these convictions established that petitioner had been previously convicted of crimes for which life sentences were imposable [Ariz.Rev.Stat.Ann. § 13-454(E)(1)] and crimes which involved the use or threat of violence on another person [Ariz.Rev.Stat.Ann. § 13-454(E)(2)]. Finally, the prosecutor argued that the trial testimony previously cited demonstrated that petitioner knowingly created a grave risk of death to other persons [Ariz.Rev.Stat.Ann. § 13-454(E)(3)]. (Id. at 57.)

Petitioner again requested a continuation of the hearing before presenting mitigation. (Id. at 66.) Because petitioner filed a petition for special action in the Arizona Supreme Court, the trial court, on April 2, 1980, continued the resentencing hearing until further order of the Arizona Supreme Court. (Minute Entry of Apr. 2, 1980.) On May 1, 1980, on stipulation of the parties, this Court dismissed the Petition for Special Action. The Pima County Attorney agreed that more than $5.00 per hour could be expended for an investigator for petitioner. (Stipulation filed Apr. 30, 1980.)

Resentencing was again scheduled for June 24, 1980. (Minute Entry of June 4, 1980.) On motion of petitioner, resentencing was continued to August 12, 1980. (Minute Entry of June 25, 1980.) On August 12, 1980, on petitioner's motion, the trial court continued resentencing until September 3, 1980, which was rescheduled for September 11, 1980.

The final portion of the resentencing hearing took place on September 11, 1980. Howard Kashman, petitioner's trial attorney, testified that Mrs. Pennington, petitioner's mother-in-law, and Sandra Blazak, his wife, testified at petitioner's first mitigation hearing. (R.T. of Sept. 11, 1980, at 5.) Mr. Kashman stated he felt he had "gotten away with" presenting more testimony in mitigation than the statute in effect at the time permitted. (Id. at 6, 9.) Mr. Kashman also informed the trial court that, if he had known there were no limitations on mitigation, he would have shown that petitioner had been employed, between the time he had been released from prison on his prior convictions, and had been arrested on the murder charges. (Id. at 6.) He would also have shown that petitioner had gotten married, had been productive, and was still very young, in his mid-twenties, at the time of trial. (Id. at 7.) Mr. Kashman would have attempted to evoke some sympathy by showing that petitioner's mother was very ill and distressed over the prosecution of her son, and this caused some damage to the family. (Id.) Also, petitioner had rejected an offer to plead guilty to voluntary manslaughter and maintained his innocence. (Id. at 8.) On cross-examination, Mr. Kashman testified that he recalled

either petitioner's wife or her mother had testified, at the first sentencing, about petitioner's employment record, and that petitioner's father had testified, at trial, that petitioner had been paid close to the date of the robbery and murders, and, therefore, had no motive for the crimes. (Id. at 9-10.)

William Heuisler, petitioner's private investigator, testified about his efforts to obtain mitigation evidence. He had worked for a law firm that handled a civil damages lawsuit based on the Brown Fox Tavern shootings. (Id. at 14.) He used information from this file but was basically unsuccessful in locating all of the original trial witnesses for possible mitigating evidence.

Petitioner's father, Steven Blazak, testified that petitioner had been married approximately 3 months before his trial. (Id. at 37.) Petitioner was working, and he and his wife "seemed happy together." (Id. at 38.) Petitioner's wife divorced him while he was in prison. (Id. at 39.) One day, a few months after petitioner's conviction, while his wife and brother went to visit petitioner at the prison, petitioner's mother committed suicide. (Id. at 41.) She had been despondent over petitioner's sentence. (Id. at 42.) Steven Blazak did not want his wife to testify at the first sentencing because she had been so upset. (Id.) Steven Blazak also testified that, before petitioner's arrest, petitioner refused to go to bars because he might have gotten in trouble if someone started a fight; that he had gotten his G.E.D.; that his bills were fully paid; and he had a bank account. (Id. at 43-44.)

Petitioner addressed the trial court. He asked the court for a life sentence so he could eventually prove his innocence. (Id. at 58-59.)

The trial court found the existence of five aggravating circumstances:

§ 13-454(E)(1): prior convictions punishable by life.

§ 13-454(E)(2): prior convictions involving the use or threat of violence.

§ 13-454(E)(3): a grave risk of death to other bar patrons.

§ 13-454(E)(5): commission of the crime in the expectation of pecuniary gain.

§ 13-454(E)(6): cruel and depraved murders because there was no justification for the killings.

The trial court found there were no mitigating circumstances sufficiently substantial to call for leniency, specifically finding that petitioner's participation in the murders was major because he was the one who did the shooting and caused the deaths. (Special Verdict, filed Sept. 11, 1980; R.T. of Sept. 11, 1980, at 59-62.)

The trial court imposed the sentence of death for both murder counts. (R.T. of Sept. 11, 1980, at 62.) Petitioner appealed from these proceedings. The Arizona Supreme Court again affirmed the sentence and denied rehearing. State v. Blazak, ___ Ariz. ___, 643 P.2d 694 (1982).

ARGUMENTS

I

PETITIONER WAS NOT PREJUDICED IN HIS ABILITY TO PRESENT MITIGATION EVIDENCE AT HIS SECOND SENTENCING.

Petitioner contends he was denied the right to a speedy trial because his resentencing occurred over 5 years after his conviction. He cites a few lower court cases that discuss application of speedy trial right to sentencing. The key to Barker v. Wingo, 407 U.S. 514 (1974), however, is prejudice to the defendant in his ability to present his case. The within case is not an appropriate vehicle for this Court to consider extending rights to a speedy trial to sentencing, because appellant has shown no prejudice.

At the first sentencing on December 17, 1974, although the statute in effect at the time did not permit the trial court to consider everything presented in mitigation, the court nevertheless permitted petitioner to present everything he wanted to present. His mother-in-law, Nellie Pennington, testified she never observed any violent or unlawful behavior by petitioner, and that he had been working for his father and Duval mine. (R.T. of Dec. 17, 1974, at 20-21.) She found him to be honest. (Id. at 21-22.) Petitioner's 17-year-old wife, Sandra Blazak, testified that petitioner recognized the responsibilities of a married man and knew how to support a wife. (Id. at 24.) He was not violent, and she never saw him with a weapon, except a BB gun. (Id. at 25-26.) He had goals of purchasing a trailer and starting a family. (Id. at 27.)

Petitioner never admitted he was guilty to Sandra Blazak. (Id.)

Also at that hearing, petitioner personally addressed the trial court for over an hour. (Id. at 38-68.) The trial court told him, at one point in the proceedings, "you can tell me anything you want me to know." (Id. at 54.) Petitioner stressed the fact that he was innocent, and had been paid $200.00 the day of the murders. (Id. at 43, 56, 68.) He had been employed the year he had been out of prison and had enjoyed it. (Id. at 44.) He had gotten his G.E.D. and was making advancement. (Id. at 56.) Petitioner also informed the trial court that he had no outstanding bills, and earned $10,000.00 that year, had worked 40 hours a week, and had received good reports from his parole officers. (Id. at 57, 59.)

At the resentencing hearing, the trial court stated it would consider all matters presented in aggravation and mitigation at the sentencing hearing of December 17, 1974, in the same manner as they were originally presented to the Court. (R.T. of Apr. 1, 1980, at 65; R.T. of Sept. 11, 1980, at 2.) On September 11, 1980, petitioner's trial attorney testified that he believed he had "gotton away with a little more than I should have," at the first sentencing. (R.T. of Sept. 11, 1980, at 6, 9.) He testified that, if he had known he could have presented anything in mitigation, he would have shown that petitioner was married, employed, and in his mid-twenties, that he maintained his innocence; and that his mother was very ill

and distressed over the prosecution of her son. (Id. at 7-8.) Petitioner's father testified that Mrs. Blazak had committed suicide and had been despondent about petitioner's conviction and sentence. (Id. at 39-42.) He also testified that petitioner seemed to have a good relationship with his wife; he had been working; he earned his G.E.D.; his bills were paid; he had a bank account; and he refused to go to bars for fear of getting into trouble. (Id. at 38-39, 43-45.)

The delay in resentencing did not interfere with petitioner's right to challenge his conviction on appeal and in a post-conviction relief proceeding. Essentially, everything that Mr. Kashman said he would have presented in mitigation, he did present on December 17, 1974, through the testimony of Nellie Pennington and Sandra Blazak. The trial court reconsidered that testimony. Petitioner was also permitted to introduce the same mitigating factors of his marriage, employment, financial solvency, etc., again on September 11, 1980, through his father's testimony. His mother did not testify at the first sentencing because "she was so upset," and her husband did not what her to. (R.T. of Sept. 11, 1980,, at 42.)

Mr. Kashman testified he wanted to obtain sympathy for the family by showing Mrs. Blazak's condition and the effect this had on the family. (Id. at 7.) Assuming for the sake of argument that this might have some relevance to the question of what sentence petitioner should receive,

petitioner showed, at resentencing, that his mother had taken her life.

Petitioner sought continuances from January 8, 1980, to September 11, 1980, to locate additional mitigating evidence. Petitioner's investigator attempted to locate witnesses to the crime. What they could have shown in mitigation for sentencing purposes is highly speculative. The jury had previously found him guilty; their verdict has been upheld in other proceedings. Mr. Kashman did not attempt to use their testimony at the first sentencing. It is just as likely that Mr. Heuisler did not find additional mitigating evidence because there was none to be found. Sandra Blazak had divorced petitioner while he was in prison. (Id. at 39.) It is reasonable to assume her testimony at the first sentencing, which the Court reconsidered, would have been more mitigating than any post-divorce testimony. In short, petitioner was not prejudiced by being granted a resentencing hearing that took place several years after the trial.

II

BECAUSE PETITIONER SHOT AND KILLED THE TWO VICTIMS, IT IS NOT CRUEL AND UNUSUAL TO IMPOSE THE DEATH SENTENCE.

Petitioner contends that it is cruel and unusual punishment to impose the death sentence on one convicted of felony murder. This Court recently held that the death sentence may not be imposed on a defendant who did not kill, attempt to kill, or contemplate that a killing would occur. Enmund v. Florida, No. 81-5321 (U.S., filed July 2,

1982). The case does not apply to the case at hand because petitioner did the shooting and caused the deaths. There is no Eighth Amendment violation in sentencing him to death.

III

PETITIONER WAS GIVEN NOTICE IN THE INDICTMENT THAT THE SENTENCES FOR FIRST DEGREE MURDER WERE LIFE OR DEATH.

Petitioner claims he did not receive notice that the death sentence was a possible sentence. This is nonsense. He was charged, in the indictment, with violating Ariz.Rev.Stat.Ann. §§ 13-451, -452, and -453 (repealed Oct. 1, 1978). Ariz.Rev.Stat.Ann. § 13-453 provided that a person convicted of first degree murder could be sentenced to life or death according to the procedures set out in Ariz.Rev.Stat.Ann. § 13-454. Petitioner had notice.

IV

ARIZONA'S SENTENCING PROCEDURES FOLLOW THE GUIDELINES OF LOCKETT V. OHIO AND ARE, THEREFORE, CONSTITUTIONAL.

Appellant contends that Arizona's death penalty statute is unconstitutional because "freakish" imposition of the death sentence may occur. The statute in effect when petitioner was sentenced provided for specific aggravating circumstances. Under State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979), anything in mitigation could be presented. This is in strict compliance with this Court's ruling in Lockett v. Ohio, 438 U.S. 586 (1978). There is no constitutional violation.

V

A JURY IS NOT REQUIRED TO IMPOSE THE SENTENCE OF DEATH.

Petitioner contends the Constitution requires that the death sentence be imposed by a jury. This Court, however, has stated as follows:

> The basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge rather than the jury. This Court has pointed out that jury sentencing in a capital case can perform an important societal function, Witherspoon v. Illinois, 391 U.S. 510, 519, n. 15, 88 S.Ct. 1770, 1775, 20 L.Ed.2d 776, but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

Proffitt v. Florida, 428 U.S. 242, 252 (1976) (emphasis added). Petitioner's contention is without merit.

VI

IT IS PERMISSIBLE TO REQUIRE A DEFENDANT TO GO FORWARD WITH HIS MITIGATION EVIDENCE AT SENTENCING.

Petitioner contends Mullaney v. Wilbur, 421 U.S. 684 (1975), holds that placing the burden of proving mitigating circumstances on a defendant violates due process. It does not. The case holds the government must prove the elements of the crime and cannot shift that burden to a defendant. It does not apply to sentencing.

Mitigation is within the knowledge of the defendant. It is not logical to require the state to go forward and prove lack of mitigation. It is logically something the defendant must go forward with. The requirement does not offend due process. See Richmond v. Cardwell, 450 F.Supp. 519, 524-25 (D.Ariz. 1978).

VII

SIMPLY BECAUSE THERE ARE PRESENTLY NO WOMEN ON CONDEMNED ROW IN ARIZONA, DOES NOT SHOW THERE IS A DENIAL OF EQUAL PROTECTION.

Petitioner contends that because there are presently no women on condemned row in Arizona, the death sentence is applied discriminatorily against males. There is absolutely no evidence developed in the record below to support this contention. The sentence of death is equally available to persons of either sex. This argument must be disregarded.

VIII

THERE IS NO EVIDENCE TO SHOW THE STATE SUPPRESSED EVIDENCE MATERIAL TO SENTENCING.

Petitioner claims the prosecution withheld "exculpatory" evidence from the defense, i.e., possibly favorable mitigation witnesses. This claim was never fully developed in the trial court. Petitioner attempted to introduce some affidavits on appeal to the Arizona Supreme Court that were not part of the record on appeal to support his claim. He refers to information in these affidavits in his petition to this Court.

Even assuming for the sake of argument the state must disclose mitigating evidence for sentencing, there is nothing in the record to support appellant's accusation that the prosecution suppressed evidence which would have been favorable to appellant. Even the nonrecord affidavits, which were signed in October and December 1980, do not support this claim. The affidavits establish that appellant's investigator, Mr. Heuisler, requested information from the County Attorney's investigator, Mr. Angeley, after appellant had already been sentenced to death. At that time, Mr. Angeley gave Mr. Heuisler some information, did not have the other information, and refused to reveal the location of appellant's former wife. There is nothing to indicate any of this information was "exculpatory" or favorable to appellant or that the prosecutor deliberately withheld any information prior to sentencing. This is nothing more than a reckless accusation based on speculation. Moreover, appellant's wife testified at the first resentencing and the trial court reconsidered this evidence. There was no prejudice.

IX

BECAUSE, UNDER ARIZONA'S SENTENCING PROCEDURES, THE ARIZONA SUPREME COURT MAKES AN INDEPENDENT REVIEW OF THE TRIAL COURT'S FINDINGS, A REMAND IS UNNECESSARY WHERE ONE AGGRAVATING CIRCUMSTANCE IS SET ASIDE ON APPEAL.

Petitioner ccontends that because the Arizona Supreme Court set aside one of the five aggravating circumstances, it should have remanded the case for resentencing. He

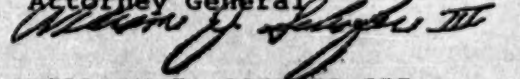
cites cases from other states where one or more of the aggravating circumstances were found improper or unconstitutional. All of those states have jury participation at sentencing. Where one aggravating circumstance was unconstitutional, a new jury was required to find and reweigh the aggravation and mitigation. In Arizona the trial court imposes sentence and the Arizona Supreme Court conducts an independent review of the trial court's findings. State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976). The Arizona Supreme Court, following Arizona's procedure, simply eliminated the aggravating circumstance it felt was not sufficiently supported. There being four remaining aggravating circumstances and no mitigating circumstances, it affirmed the death sentence. A new hearing was not called for under Arizona's procedures.

CONCLUSION

Petitioner's contentions fall into the categories of meritless or insufficiently supported by the record. This case is not an appropriate vehicle for shaping constitutional law and respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General



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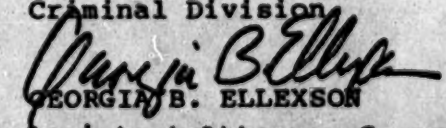

GEORGIA B. ELLEXSON
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AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

GEORGIA B. ELLEXSON, being first duly sworn upon oath, deposes and says:

That she served appellant in the foregoing case by forwarding one (1) copy of RESPONSE TO PETITION FOR WRIT OF CERTIORARI; and also served the attorney for the appellant in the foregoing case by forwarding two (2) copies of RESPONSE TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

THOMAS E. HIGGINS, JR.
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MITCHELL THOMAS BLAZAK
Box B-28599
Arizona State Prison
Florence, Arizona 85232

this 19th day of August, 1982.

Georgia B. Ellexson
GEORGIA B. ELLEXSON

SUBSCRIBED AND SWORN to before me this 19th day of August, 1982.

Elizabeth J. Benda
NOTARY PUBLIC

My Commission Expires:

July 17, 1982

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